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8  
9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 MAINE STATE RETIREMENT  
12 SYSTEM, individually and on behalf  
of all others similarly situated,

13 Plaintiff,

14 v.

15 COUNTRYWIDE FINANCIAL  
16 CORPORATION, et al.,

17 Defendants.

Case No. 2:10-CV-00302 MRP (MAN)

**BANK OF AMERICA  
CORPORATION AND NB  
HOLDINGS CORPORATION'S  
REPLY MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
FURTHER SUPPORT OF THEIR  
MOTION TO DISMISS THE  
AMENDED CONSOLIDATED  
CLASS ACTION COMPLAINT**

Hearing Date: October 18, 2010

Time: 11:00 a.m.

Judge: Honorable Mariana R. Pfaelzer

Courtroom: Courtroom 12

Spring Street Courthouse

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**PRELIMINARY STATEMENT<sup>1</sup>**

Plaintiffs do not dispute the key points that require dismissing the Amended Complaint's claims against BAC and NB:

- To state a successor-liability claim under Delaware's *de facto* merger doctrine, the complaint must allege that the asset sale was designed to disadvantage shareholders or creditors.
- The amended complaint contains no such allegations regarding either (i) CFC's July 2008 merger into a BAC subsidiary in exchange for BAC stock, or (ii) BAC's November 2008 purchase of certain of CFC's (and its subsidiary, Countrywide Home Loans, Inc.'s (CHL)) assets.

Accordingly, the Amended Complaint's successor-liability claims should be dismissed.

Plaintiffs try to salvage their claims by arguing that the Amended Complaint pleads a *de facto* merger under California law. That effort fails for two reasons.

First, California law does not apply. Because this Court has federal-question jurisdiction, federal choice-of-law principles govern. Under those principles, Delaware law applies, because (i) the Court should apply the law of the state with the greatest interest in determining the circumstances under which successor liability should be imposed on a parent company for its subsidiary's conduct; and (ii) Delaware—where both BAC and CFC are incorporated—has the greatest interest here. In arguing for California law, Plaintiffs incorrectly rely on California's choice-of-law rules, which do not apply here because the Court is not sitting in diversity jurisdiction applying California substantive law.

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<sup>1</sup> Unless otherwise specified, all defined terms shall have the meaning ascribed to them in BAC and NB Holdings' Memorandum of Points and Authorities in Support of Their Motion to Dismiss the Amended Consolidated Class Action Complaint, all citations are omitted and all emphasis is added.

1 Second, even if California law were to apply as Plaintiffs contend,  
2 Plaintiffs' *de facto* merger theory would still fail. The very authorities Plaintiffs  
3 cite show that California, like Delaware, requires that an asset transfer was  
4 designed to disadvantage shareholders or creditors: "The [*de facto* merger]  
5 exception has been invoked where one corporation takes *all* of another's assets  
6 without providing *any* consideration that could be made available to meet claims of  
7 the other's creditors . . . ." <sup>2</sup> These essential allegations are absent here. To the  
8 contrary, Plaintiffs do not dispute that BAC provided valuable consideration  
9 (including by assuming certain CFC debts and guarantees) when BAC acquired  
10 CFC assets in November 2008. Nor can Plaintiffs overcome this defect by citing  
11 anecdotal evidence of ordinary business-integration activities—much of which  
12 appears nowhere in the Amended Complaint. This Court has already rejected the  
13 identical integration argument involving the identical companies when it dismissed  
14 (without leave to amend) an identical successor-liability claim in *Argent*. <sup>3</sup> This  
15 case is no different and should likewise be dismissed.

## 16 ARGUMENT

### 17 I. THE SUCCESSOR-LIABILITY CLAIM AGAINST BAC SHOULD BE 18 DISMISSED.

#### 19 A. Delaware Law Applies to Any Effort to Disregard CFC's 20 Corporate Form.

21 Plaintiffs agree, as they must, that this Court should use state law to  
22 decide whether CFC has *de facto* merged into BAC. (Pls. Opp. at 5.) But they  
23 erroneously contend that the Court should apply the law of the forum unless BAC  
24 identifies a conflict between California law and other applicable law. (Pls. Opp. at  
25 6). That might be correct if this Court were sitting in diversity jurisdiction. *See*

26 <sup>2</sup> *Ray v. Alad Corp.*, 19 Cal. 3d 22, 28, 136 Cal. Rptr. 574, 578 (1977).

27 <sup>3</sup> *Argent Classic Convertible Arbitrage Fund L.P. v. Countrywide Fin. Corp.*,  
28 No. CV 07-0797 (MRP), slip op. at 7–9 (C.D. Cal. Mar. 19, 2009).

1 *CRS Recovery, Inc. v. Laxton*, 600 F.3d 1138, 1141-42 (9th Cir. 2010) (“When a  
2 federal court sits in diversity to hear state law claims, the conflicts laws of the  
3 forum state—here California—are used to determine which state’s substantive law  
4 applies”; concluding under California choice-of-law rules that “[a]s a default, the  
5 law of the forum state will be invoked, and the burden is with the proponent of  
6 foreign law to show that the foreign rule of decision will further the interests of that  
7 state”). But this is a federal-question case (Am. Compl. ¶ 18), in which “the court  
8 should apply *federal*, not forum state, choice of law rules.” *In re Lindsay*, 59 F.3d  
9 942, 948 (9th Cir. 1993) (collecting cases). The authorities on which Plaintiffs rely  
10 do not apply this standard, and are therefore inapposite. *See Berg Chilling System,*  
11 *Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006) (applying forum state’s choice-  
12 of-law rules “because in an action based on *diversity of citizenship jurisdiction*, we  
13 must apply the substantive law of the state in which the District Court sat”);  
14 *Chrysler Corp. v. Ford Motor Co.*, 972 F. Supp. 1097, 1101 n.1 (E.D. Mich. 1997)  
15 (observing that “[s]ince jurisdiction arises under federal law rather than by  
16 diversity, forum state choice of law is not mandated,” but concluding that “I need  
17 not choose between” federal or forum state choice-of-law rules “[b]ecause analysis  
18 under either framework leads” to the same result).

19 The governing federal choice-of-law rules require that this Court apply  
20 Delaware law. (*See* Def. Mem. at 7.) In determining the liabilities of a corporation,  
21 the Restatement (Second) of Conflict of Laws looks to the law of the state with the  
22 strongest relationship to the dispute, which is the “local law of the state of  
23 incorporation.” Restatement (Second) of Conflict of Laws § 306. As Plaintiffs’  
24 own authority acknowledges, *de facto* merger liability implicates corporate law.  
25 *See Berg*, 435 F.3d at 464–65 (observing that successor-liability theories are “all  
26 founded in corporate and contract law” and that “the *de facto* merger exception is  
27 not strictly contractual”). In these circumstances, where a plaintiff is trying to  
28 impose liability on a parent corporation for the acts of its subsidiary, the Court



1 should apply the law of the alleged successor-in-interest's state of incorporation,  
2 which has the greatest interest in disputes concerning efforts to disregard the  
3 successor's corporate form. *See, e.g., In re McKesson HBOC, Inc. Sec. Litig.*, 126  
4 F. Supp. 2d 1248, 1276–77 (N.D. Cal. 2000) (applying law of alleged successor's  
5 state of incorporation in dismissing successor liability claim). BAC is a Delaware  
6 corporation. Thus, under the governing federal choice-of-law principles, it is  
7 Delaware—not California, as Plaintiffs contend—that has the greatest interest in  
8 this action's outcome. (Pls. Opp. at 8–9.) Plaintiffs' remaining cases do not  
9 warrant a different result, because none involves an alleged *de facto* merger.<sup>4</sup>

10 **B. The Amended Complaint Does Not State a Successor-Liability**  
11 **Claim Under The “de Facto” Merger Doctrine.**

12 Plaintiffs do not dispute that Delaware law recognizes a *de facto*  
13 merger only where (among other things) an asset sale was engineered to  
14 disadvantage shareholders or creditors. *See, e.g., McKesson*, 126 F. Supp. 2d at  
15 1276–77. (Def. Mem. at 7–8.) Yet, the Amended Complaint does not allege that  
16 BAC or CFC structured either transaction at issue—(i) the June 2008 forward  
17 triangular merger of CFC into a BAC subsidiary; or (ii) BAC's November 2008  
18 acquisition of certain CFC assets (from CFC and CHL) in exchange for, among  
19 other consideration, BAC's assumption of substantial CFC liabilities and  
20 guarantees—to harm CFC's shareholders or creditors. Absent allegations that those  
21 transactions were “structured to disadvantage [the] creditors or shareholders,” as

22 <sup>4</sup> *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462  
23 U.S. 611, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983) (applying United States law to a  
24 foreign sovereign-immunity issue involving a Cuban bank); *Hernandez v. Burger*,  
25 102 Cal. App. 3d 795, 162 Cal. Rptr. 564 (4th Dist. 1980) (concluding that Mexican  
26 law limiting liability applied to tort claims for an accident occurring in Mexico);  
27 *Nestle U.S.A. v. Travelers Cas. & Surety Co.*, Case No. CV98-5515-HLH(Mcx),  
28 1998 U.S. Dist. LEXIS 17287 (C.D. Cal. 1998) (choosing applicable law for an  
insurance coverage dispute); *R&R Sails, Inc. v. Ins. Co. of the State of Pa.*, 610 F.  
Supp. 2d 1222 (S.D. Cal. 2009) (same); *High Country Linens, Inc. v. Block*, No. C  
01-02180 CRB, 2002 WL 1998272 (N.D. Cal. Aug. 20, 2002) (choosing law to  
apply to claims for interference with contractual relations and common law  
trademark infringement).



1 Delaware law requires, Plaintiffs' successor-liability claim should be dismissed.  
2 *McKesson*, 126 F. Supp. 2d at 1276–77.

3 The outcome would be no different under California law. (Pls. Opp. at  
4 10–12.) In fact, Plaintiffs have insisted that successor-liability law in Delaware and  
5 California is “substantially similar.” (Pls. Opp. at 7 (citing *Atchison, Topeka &*  
6 *Santa Fe Ry. Co. v. Brown & Bryant*, 159 F.3d 358, 363 (9th Cir. 1988) (observing  
7 that the law of all fifty states on successor liability is “largely uniform”)).) Like the  
8 governing Delaware-law cases, the California *de facto* merger cases on which  
9 Plaintiffs rely require allegations depicting an intent to harm creditors or  
10 shareholders, such as by transferring assets without consideration or leaving the  
11 seller an empty shell:

- 12 • “The *de facto* merger doctrine has been applied in situations where the  
13 assets of one company are transferred to a successor without an  
14 exchange of consideration that could be used to offset the merging  
15 company’s liabilities.” *625 3rd St. Assoc., L.P. v. Alliant Credit Union*,  
16 633 F. Supp. 2d 1040, 1046 (N.D. Cal. 2009) (applying California  
17 law).
- 18 • “[T]he purchase of [the seller’s] assets did not amount to a  
19 consolidation or merger. This exception has been invoked where one  
20 corporation takes *all* of another’s assets without providing *any*  
21 consideration that could be made available to meet claims of the  
22 other’s creditors . . . .” *Ray*, 19 Cal. 3d at 28.
- 23 • “The [*de facto* merger] exception applies where the assets of one  
24 corporation are transferred without consideration which can be made  
25 available to satisfy claims or where the consideration consists wholly  
26 of shares of the purchaser’s stock which are promptly distributed to the  
27 seller’s shareholders in conjunction with the seller’s liquidation.”  
28 *Marks v. Minn. Mining & Mfg. Co.*, 187 Cal. App. 3d 1429, 1435, 232

1 Cal. Rptr. 594, 597 (1986).

2 Neither transaction alleged in the Amended Complaint qualifies as a *de facto*  
3 merger under this standard.

4 First, CFC's June 2008 merger into BAC subsidiary Red Oak in  
5 exchange for BAC stock was not an asset transfer; it was a forward triangular  
6 merger in which CFC merged into a BAC subsidiary. By operation of Delaware  
7 law, that BAC subsidiary succeeded to CFC's assets *and* liabilities.<sup>5</sup> Triangular  
8 mergers are "common and have a myriad of legitimate justifications." *Lewis v.*  
9 *Ward*, 852 A.2d 896, 906 (Del. 2004).

10 Second, although the November 2008 transaction was an asset transfer,  
11 Plaintiffs concede that BAC provided consideration (by, among other things,  
12 assuming approximately \$16.6 billion of liabilities and guarantees) in exchange for  
13 CFC assets (including CHL assets) in November 2008. (Pls. Opp. at 11 (quoting  
14 this Court's finding in *Argent* that BAC assumed debt "in consideration of the asset  
15 purchase").) That consideration distinguishes the CFC asset sale under the standard  
16 applied in Plaintiffs' authorities, the linchpin of which is the exchange of assets  
17 either for nothing or for "shares of the purchaser's stock which are promptly  
18 distributed to the seller's shareholders in conjunction with the seller's liquidation,"  
19 leaving the seller an empty shell. *Ray*, 19 Cal. 3d at 28. Plaintiffs all but concede  
20 this decisive distinction in their opposition: "for the transaction to be considered a  
21 *de facto* merger . . . the acquirer [must] pay for the target company's assets  
22 *exclusively in stock*." (Pls. Opp. at 8.) But BAC paid for the assets by providing  
23 more than \$16.6 billion in value (Close Decl., Ex. 6 at 399), and so Plaintiffs' *de*

24 <sup>5</sup> Del. Code Ann. tit. 8, § 259(a) ("When any merger or consolidation shall  
25 have become effective under this chapter, . . . the constituent corporations shall  
26 become a new corporation, or be merged into [one of the constituent] corporations,  
27 as the case may be, . . . being subject to all the restrictions, disabilities and duties of  
28 each of such corporations so merged or consolidated; . . . and all debts, liabilities  
and duties of the respective constituent corporations shall thenceforth attach to said  
surviving or resulting corporation, and may be enforced against it to the same  
extent as if said debts, liabilities and duties had been incurred or contracted by it.").

1 *facto* merger argument fails even under the standard they advocate.

2 Unable to allege the touchstone element of a *de facto* merger, Plaintiffs  
3 resort to obfuscating the facts in attempting to satisfy the other *de facto* merger  
4 elements:

5 *Continuity of ownership.* In asserting that “BAC paid Countrywide  
6 shareholders exclusively in BAC stock when it acquired Countrywide” (Pls. Opp. at  
7 10), Plaintiffs refer to the wrong transaction. CFC’s merger with a BAC subsidiary  
8 in exchange for BAC stock was not an asset transfer that could qualify as a *de facto*  
9 merger—rather, it was a “common” *de jure* merger in which the BAC subsidiary  
10 succeeded to all of CFC’s assets and liabilities as a matter of law. *See Lewis*, 852  
11 A.2d at 906. Nor would that subsidiary’s November 2008 sale of CFC assets to  
12 BAC satisfy the continuity-of-ownership requirement, because the consideration for  
13 that transfer was not BAC stock, but rather BAC’s assumption of CFC debts and  
14 guarantees, among other things. Plaintiffs inappropriately attempt to blur these  
15 transactions. *See Sunnyside Dev. Co., LLC v. Opsys Ltd.*, No. C 05 0553, 2007 WL  
16 2462142, at \*9 (N.D. Cal. Aug. 29, 2007) (rejecting *de facto* merger theory because  
17 plaintiff was “selectively characterizing the 2002 and 2004 transactions as a single  
18 transaction in certain respects and as separate transactions in other respects”).

19 *Business continuation and integration.* Plaintiffs do not dispute this  
20 Court’s holding in *Argent* that ordinary business-integration activities do not depict  
21 a *de facto* merger. (Def. Mem. at 9.) Accordingly, their assertion that “BAC and  
22 Countrywide have consolidated business operations” is immaterial. (Pls. Opp. at  
23 10.) Moreover, Plaintiffs base that argument substantially on anecdotal news  
24 articles or loose statements that they attach to their opposition, including that BAC  
25 is “working to integrate Countrywide’s 1,000 mortgage offices” and intends to  
26 “leverage Countrywide’s mortgage origination and servicing capabilities.” (Pls.  
27 Opp. at 10.) These allegations appear nowhere in the Amended Complaint, and  
28 therefore should not be considered on this motion. *See, e.g., Schneider v.*

1 *California Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (“[A] court may  
2 not look beyond the complaint to a plaintiff’s moving papers, such as a  
3 memorandum in opposition to a defendant’s motion to dismiss.”); *Jones v.*  
4 *Thyssenkrupp Elevator Corp.*, No. C-05-3539, 2006 WL 680553, at \*2 (N.D. Cal.  
5 Mar. 14, 2006) (“[T]he court may not consider new allegations and exhibits  
6 contained in plaintiff’s opposition.”). And because these statements involve  
7 nothing more than ordinary business-integration steps, they would not support a *de*  
8 *facto* merger finding in any event.

9           *Cessation of operations.* Plaintiffs’ assertion that “Countrywide has  
10 ceased operations” is legally insufficient and factually incorrect. (Pls. Opp. at 11.)  
11 The very authorities cited by Plaintiffs require the asset seller not only to cease its  
12 operations, but also to dissolve entirely, “thus sheltering its assets from creditors.”  
13 *Chrysler*, 972 F. Supp. at 1111; *see also Ray*, 19 Cal. 3d at 28–29 (refusing to find  
14 *de facto* merger despite seller’s subsequent dissolution, because of consideration  
15 given for asset sale); *Marks*, 187 Cal. App. 3d at 1437–38 (finding *de facto* merger  
16 when subsidiary was “reorganized as a division of [its parent] and then dissolved”).  
17 When the purchaser and seller continue as “separate entities” after the asset sale,  
18 there can be no *de facto* merger. *Chrysler*, 972 F. Supp. at 1111. Here, Plaintiffs  
19 do not dispute that CFC remains a wholly owned BAC subsidiary. (Def. Mem. at  
20 4.) Rather, in addition to citing the CFC asset sale, their opposition merely  
21 rehashes their allegations that BAC (i) retired CFC’s brand and website, without  
22 contesting BAC’s argument that such superficial changes carry no weight under the  
23 *de facto* merger doctrine; and (ii) consolidated CFC into BAC’s financial  
24 statements, without contesting BAC’s argument that such consolidation was in fact  
25 required under the securities laws. (*Compare* Pls. Opp. at 3 *with* Def. Mem. at 9–  
26 10.)

1           BAC's assumption of CFC obligations. Equally off-base is Plaintiffs'  
2     assertion that "the Complaint's allegations" show that BAC assumed "obligations  
3     sufficient to continue [CFC's] underlying business." (Pls. Opp. at 12.) In fact,  
4     Plaintiffs point only to the Court's *Argent* decision and a lone paragraph in the  
5     Amended Complaint in alleging that BAC (i) assumed "certain" unspecified CFC  
6     debts and guarantees in the asset sale (Am. Compl. ¶ 30), and (ii) agreed to  
7     restructure certain existing CFC mortgages. (Pls. Opp. at 11–12.) Plaintiffs do not  
8     contest this Court's ruling in *Argent* that assuming *some* of an acquired subsidiary's  
9     liabilities does not imply that the acquirer will pay others. (Def. Mem. at 10.) Nor  
10    does the Amended Complaint allege that BAC assumed the "normal operating  
11    liabilities" that Plaintiffs' own authority requires. *Marks*, 187 Cal. App. 3d at 1436  
12    (finding *de facto* merger where, among other things, "all [the seller's] normal  
13    operating liabilities were assumed" by the acquirer). Even if the Amended  
14    Complaint were to contain such an allegation, that alone would not be enough to  
15    plead a *de facto* merger. As Plaintiffs' authorities recognize, Plaintiffs must plead  
16    *all* the elements to make out a *de facto* merger claim, which Plaintiffs have not  
17    done. *Compare Marks*, 187 Cal. App. 3d at 1437 (requiring "all of the indicia of a  
18    *de facto* merger" to impose successor liability) *with Berg*, 435 F.3d at 468-70  
19    refusing to impose successor liability where plaintiff did not satisfy all *de facto*  
20    merger elements).

21           Plaintiffs' half-hearted effort distinguish this case from *Argent* falls  
22    flat. The core allegations in both actions are the same. The challenged transactions  
23    are the same: (i) the stock-for-stock merger between CFC and a BAC subsidiary,  
24    and (ii) BAC's purchase of CFC assets (including those of CFC's subsidiary) in  
25    exchange for its assumption of substantial CFC debts and guarantees and other  
26    consideration. The allegations' common theme is the same: the transactions  
27    allegedly constitute a *de facto* merger because BAC is "integrating" CFC's business  
28    and operations. (*Compare Argent*, slip op. at 8 (reciting allegation that BAC was

1 “integrat[ing]” CFC) *with* Pls. Opp. at 11 (arguing that BAC is “working to  
2 integrate” CFC’s mortgage business). And the result should be the same—  
3 dismissal without leave to amend.

4 **C. Plaintiffs’ Reliance on the *MBIA* Decision Is Unavailing.**

5 As expected, in arguing that BAC and CFC *de facto* merged, Plaintiffs  
6 rely heavily on the New York Supreme Court’s decision in *MBIA Insurance Corp.*  
7 *v. Countrywide Home Loans*, Index No. 602825/08 (Sup. Ct., N.Y. Co. April 29,  
8 2010) (Close Decl., Ex. 10). But Plaintiffs nowhere address the fundamental flaw  
9 in *MBIA* that BAC identified in its opening memorandum—that decision failed to  
10 require *MBIA* to allege that the BAC–CFC transactions were engineered to harm  
11 CFC’s shareholders and creditors. (*See* Def. Mem. at 11–13.) For this reason  
12 alone, *MBIA*’s holding is wrong and should not be adopted here.

13 Further, *MBIA*’s determinations that the complaint there adequately  
14 pleaded the elements of *de facto* merger liability is at odds with both this Court’s  
15 *Argent* decision and California law (on which Plaintiffs here rely):

- 16 • *MBIA* held that the complaint there adequately pleaded a continuity of  
17 shareholders through an allegation that BAC acquired CFC in  
18 exchange for BAC stock. *MBIA*, slip op. at 13. But as discussed  
19 above, the transaction that Plaintiffs allege gave rise to the *de facto*  
20 merger between BAC and CFC was an asset purchase in exchange for  
21 more than \$16.6 billion in consideration. Even under the standard  
22 Plaintiffs advocate, that transaction cannot satisfy the ownership-  
23 continuity requirement. (*See* p. 7, *supra*.)
- 24 • The court in *MBIA* found that allegations of normal integration  
25 activities between BAC and CFC sufficed to state a claim that BAC  
26 intended to “absorb” CFC. *MBIA*, slip op. at 15. But as this Court  
27 correctly held in *Argent*, such ordinary integration activities are  
28 irrelevant to the *de facto* merger analysis. *See Argent*, slip op. at 8.



- 1       • Plaintiffs argue that the *MBIA* decision concluded that transferring  
2       CFC's assets adequately alleged cessation of its ordinary business  
3       activities. *MBIA*, slip op. at 14. But as Plaintiffs' own authorities  
4       show, this is not enough: the continued parallel existence of the two  
5       companies defeats any *de facto* merger claim. (*See* p. 8, *supra*.)  
6

7           In view of these fundamental distinctions between *MBIA* and this case,  
8       this Court should reaffirm its decision in *Argent* and dismiss the *de facto* merger  
9       claims.

10           **D. The Amended Complaint's Allegation That BAC Is a Successor to**  
11           **CSC, CCM and CHL Is Conclusory.**

12           Plaintiffs' opposition makes no attempt to defend the Amended  
13       Complaint's conclusory allegation that BAC is also a successor to three other  
14       Countrywide entities. (Am. Compl. ¶ 233.) Absent any factual allegations to  
15       support this bare legal conclusion, Plaintiffs' successor-liability claim based on this  
16       allegation must be dismissed. (Def. Mem. at 13.)  
17

18           **II. THE SUCCESSOR-LIABILITY CLAIM AGAINST NB IS ALSO**  
19           **DEFICIENT.**

20           Plaintiffs' opposition makes clear that its successor-liability claim  
21       against NB rests on a solitary, unsupported allegation that CHL sold "substantially  
22       all of its assets" to NB. (Am. Compl. ¶ 31; Pls. Opp. at 12.) Even accepting that  
23       allegation as true, an asset sale alone does not transfer the seller's liabilities, as this  
24       Court observed in *Argent*. (Def. Mem. at 14; *see also supra* at 9.) Equally  
25       defective is Plaintiffs' afterthought remark in their opposition that "Defendants  
26       acquired . . . none of [CHL's] liabilities." (Pls. Opp. at 13.) As Plaintiffs' own  
27       authority makes clear, the key factor is the consideration the buyer provided, not the  
28       liabilities it assumed. *See Malone v. Red Top Cab Co.*, 16 Cal. App. 2d 268, 273



(1936) (imposing obligation on buyer “to meet the seller’s debts or liabilities . . . where, as here, one corporation takes all the property of another corporation, *without any consideration* passing to the selling corporation”).<sup>6</sup> Here, the Amended Complaint fails to allege any facts about CHL’s alleged asset sale, let alone what consideration was exchanged. Plaintiffs’ conclusory assertion that “NB should be liable for the conduct of CFC, CSC, and CCM” is similarly bare. (Pls. Opp. at 13 n.7.) Both claims against NB should therefore be dismissed. (Def. Mem. at 13–14.)

### CONCLUSION

Plaintiffs do not attempt to argue that they have pleaded a *de facto* merger under Delaware law. And for good reason: the Amended Complaint contains no allegations that either CFC’s July 2008 acquisition by a BAC subsidiary or the November 2008 sale of assets to BAC was designed to disadvantage shareholders or creditors. Although Plaintiffs try to neutralize this defect by erroneously arguing under California law, the choice-of-law principles that apply in this federal-question case require the Court to apply the law of the state of incorporation, not the forum. And the outcome would be no different in any event: California also requires allegations showing intentional harm to creditors—*i.e.*, that an asset sale involved no exchange of consideration.

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<sup>6</sup> Plaintiffs’ other authorities likewise require allegations showing an intent to harm creditors, which the Amended Complaint lacks. *See Blank v. Olcovich Shoe Corp.*, 20 Cal. App. 2d 456, 461 (1937) (“[C]orporations cannot escape liability by a mere change of name or shift of assets . . . when actual fraud or the rights of creditors are involved . . .”); *Strahm v. Fraser*, 32 Cal. App. 447, 448 (1916) (requiring proof that “a transfer of the corporate assets from the old to the new corporation” was “done to hinder, delay, and defraud creditors of the old corporation”).

1 Because the Amended Complaint contains no such allegations against either BAC  
2 or NB—indeed, Plaintiffs do not contest that BAC transferred more than \$16.6  
3 billion in value in exchange for the assets—Plaintiffs’ successor-liability claims  
4 should be dismissed.

5  
6 Dated: September 29, 2010

7 Respectfully submitted,

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10  
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